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No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1991

BURT H. SAGEN,
Petitioner,

vs.

DISCIPLINARY COUNSEL,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE OHIO SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a Disciplinary Panel may, consistent with due process of law, find a violation of the Code of Professional Responsibilities upon matters not charged in the disciplinary complaint but offered for the first time during the course of the Disciplinary hearing over the objection of the attorney which is contrary to the pronouncement in *In re Ruffalo*, 390 U.S. 544 (1968).

2. Whether the failure of the Ohio Supreme Court to exercise its discretion in defining causes for the disciplinary action against an attorney within reasonable constraints and to follow its own case law on the same subject violates due process of law.

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OPINIONS BELOW

The Ohio Supreme Court issued a published opinion, reported at 61 Ohio St. 3d 62, 572 N.E.2d 658 (1991), *rehearing denied*, 61 Ohio St. 3d 1432, 575 N.E.2d 220 (1991).

JURISDICTION

The Ohio Supreme Court issued its judgment and mandate on July 3, 1991. Petitioner timely filed a motion for a rehearing. The motion for a rehearing was denied on August 7, 1991. Statutory provision believed to confer jurisdiction is 28 U.S.C. Sec. 1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution
Amendment XIV, Section I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This action originated on August 25, 1989 when a complaint and certificate was filed against the petitioner, Burt H. Sagen, alleging five claims of alleged misconduct.

An amended complaint was filed on November 9, 1989, again alleging five counts of misconduct, and petitioner filed his answer.

A panel was designated and hearing was held at Cleveland, Ohio on June 21, 1990 and June 22, 1990. At the hearing respondent called eleven witnesses and petitioner called nine witnesses. In addition some 50 exhibits were entered into evidence by the respondent and 10 exhibits were offered and received on behalf of the petitioner. Thereafter, the Board of Commissioners issued its Findings, Conclusions, and Recommendations (A6).

The Board found that Count I (The Bohaty Matter), Count II (The Mortgage Matter) and Count V (The Szakacs Probate Matter) had been proven, but that Count III (The Police Report Claim) and Count IV (The Unauthorized Practice of Law Claim) had not been proven. Based upon these findings the Board recommended that the petitioner be disbarred.

Petitioner filed objections to the Board's findings, conclusions and recommendations in the Ohio Supreme Court. The Ohio Supreme Court, in a terse opinion released on July 3, 1991 adopted the findings of the Board and permanently disbarred the petitioner. Petitioner thereafter filed a motion for a rehearing in the Ohio Supreme Court which was overruled on August 7, 1991.

STATEMENT OF FACTS

There were five counts set forth in the amended complaint. Since the Board only found against petitioner as to three counts the statement of facts will be limited to that testimony and evidence relative to the three counts which are before this Court. The following sets forth the "allegations" so as to allow this Court to be able to determine the ultimate issues in dispute. Thereafter the evidence offered on these claims and the findings are set forth.

Count One—Introduction

Petitioner is charged with conversion of funds. It is petitioner's position that the evidence does not support a finding of conversion of funds. The Bohatys entered into a land contract with the Humphreys who thereafter defaulted. The Bohatys sued, and petitioner successfully defended the Humphreys. While the matter was pending, the Humphreys deeded the property to "R & B" a corporation in which petitioner had an interest. R & B then advanced the money to be held in escrow by attorney Neeper. The money was to be paid to the Bohatys *upon* their providing sufficient title. Appeals were had and disputes continued, and the trial court's judgment remained firm. Mr. Neeper ultimately, and on his own, returned the money to petitioner and petitioner, after the passage of additional time and in the absence of good title, returned the money to R & B. R & B later sold the property to an acquaintance of petitioner, all of which was documented, and mortgages were obtained. R & B has not returned the money to petitioner for payment to the Bohatys. There is no evidence in these facts of conversion by petitioner.

The Board also found, *although it had not been charged*, that the July 22, 1974 deed from both Humphreys to R & B was not signed by Carol Humphrey. Having not been charged with this conduct, due process requirements prohibit any finding on this matter. Of equal importance is the fact that the testimony established that although Carol Humphrey states that she did not sign that deed, she acknowledged that her husband had most of the dealings, had authority to sign her name, had signed her name in other instances, and that she, later and with the assistance of an independent attorney, executed a subsequent deed confirming the transfer to R & B, and finally, that she had no interest in the property. It is respectfully submitted that in addition to the fact that this matter was not charged, the evidence would not support a finding of any violation in regard to the signature of Carol Humphrey on the deed.

The allegations are hereafter set forth, then the evidence, and then the finding, so as to clarify this matter.

Count One (The Bohaty Matter)
The Allegations

Petitioner, based upon the facts alleged, or even proven, herein, was charged with "conversion" of clients' money.

Count One alleged that Ethel Bohaty and her husband, Vencel Bohaty, on November 7, 1969, sold a 20 acre tract of land on a land contract to Robert and Carol Humphrey. The Humphreys defaulted in their payments and suit was brought by the Bohatys on December 1, 1972. The Humphreys hired the petitioner to represent them and they filed an answer and counterclaim. The court on July 22, 1976, *found for the Humphreys* on the

counterclaim and ordered the Humphreys to pay the plaintiffs for the property and ordered the plaintiffs to deed the property to the Humphreys. The Bohatys appealed the decision to the Court of Appeals for Medina County which affirmed the trial court. A subsequent appeal to the Ohio Supreme Court was disallowed.

The amended complaint further alleged that during the proceedings the Humphreys caused to be deposited money into court and then this money was placed in escrow with Lorin Neeper in the amount of $13,361.00. The Common Pleas Court ordered that the money be paid to the Bohatys *and* that a conveyance of the property be made to the Humphreys. The complaint then alleged that the petitioner refused to consent to the payment of the money to the Bohatys by the escrow agent *because the title was not a marketable title.* The escrow agent, Lorin Neeper, then returned the $13,361.00 to petitioner on November 23, 1977.

The amended complaint further alleged that petitioner prepared, witnessed and notarized a warranty deed transferring the property from the Humphreys to R & B Restoration, Inc. The deed was executed on July 22, 1974 when the money was with the escrow agent, but not recorded until September 21, 1979. The amended complaint alleged that R & B was a closely held corporation in which the petitioner was an officer. It was further alleged that on the same date, September 21, 1979, a deed was filed transferring the property to Douglas McIntosh who, it was alleged, was a business associate and friend of petitioner. The amended complaint further alleged that the recorder's records reflect that on September 21, 1979 *petitioner* was a grantee of a mortgage deed from McIntosh on this property in the amount of $4,700.00. It was alleged that

these records also disclosed that on September 16, 1980 McIntosh was the grantor of a mortgage to R & B Restoration on the same property in the amount of $13,300.00, which mortgage deed was prepared and witnessed by petitioner.

The amended complaint further alleged that on April 4, 1981 petitioner prepared, witnessed and notarized a quit claim deed from McIntosh to Margaret Sikora (who is Margaret Cole) who was petitioner's secretary. The amended complaint further alleged that the attorney for the Bohatys attempted to recover the *monies allegedly owed by the petitioner* to the Bohatys, and thereafter filed suit in the Common Pleas Court of Cuyahoga County against petitioner. After a jury trial the verdict was entered on October 4, 1985 in favor of the Bohatys and the petitioner appealed. The Court of Appeals affirmed the judgment on March 5, 1987 and it was alleged that the judgment has not been paid.

It is based upon *these allegations* that respondent charges "conversion of funds" by the petitioner in violation of DR1-102 (A)(3), (4), (5) and (6), and DR9-101 (as to "appearance of impropriety").

Count One (The Bohaty Matter)
Findings by Board

The Board mainly related some historical facts and concluded that the *civil judgment* entered in favor of the Bohatys against the petitioner was not paid (which is true but explained), and that the signature on the original deed assigning the land from the Humphreys to R & B Restoration contained a forged signature of Carol Humphrey (a finding that *may* be true, but which was not done with the knowledge of petitioner and was

clearly ratified by Carol Humphrey per her testimony and the testimony of her attorney, Mr. Logee). Of even greater importance, it *must be noted that petitioner was never charged with this act.*

It is respectfully submitted that there is no evidence of conversion of funds and no other charge before the Panel.

Count Two—Introduction

The charge is that petitioner entered into fraudulent conduct by executing a deed in which he acknowledged that he held himself out to be "Richard Cole" and signed his name as "Richard Cole" in transferring a one half interest in the property *back* to himself. Petitioner and his wife owned the Janette property, made substantial improvements on the same, and owed a mortgage on same. They then deeded that property to Margaret Cole and "Richard Cole" with the understanding that petitioner was "Richard Cole" for purposes of the transfer. Mrs. Cole made no payments for the house and assumed no liabilities, and under the "Trust Agreement" of conveyance was to have a one half interest in the property. Mrs. Cole, whose testimony was found by the Board to not be credible, later asserted in civil court that she had an interest in the entire property, which case was dismissed for want of prosecution. The Board chose to believe that petitioner was lying when he stated at the hearing that he had held himself out to be "Richard Cole", notwithstanding the evidence. It is respectfully submitted that the evidence supports petitioner's position and that there is not clear and convincing evidence of any dishonest act by petitioner in this matter.

Count Two (The Mortgage Claim)
The Allegations

Count Two alleged that Margaret Cole Hughes, the complainant, was formerly a secretary for the petitioner. It was alleged that on or about November 26, 1980 petitioner and his wife transferred a home at 12479 Janette Drive, Strongsville, Ohio to Margaret Cole and Richard Cole, and that at the time of transfer, there was a $17,000.00 open end mortgage on the property from petitioner and his wife, held by Strongsville Savings & Loan Company. The amended complaint alleged that Richard Cole, who is the brother of Margaret Cole, transferred his interest in the property by quit claim deed dated September 3, 1984 to his mother, Lucille Cole.

The amended complaint alleged that on November 15, 1984 the petitioner was the statutory agent for and incorporator of Gibraltar Investment Co., and that its president, Allen Gale, was a close friend and client of the petitioner.

The amended complaint alleged that on January 9, 1985 the petitioner executed a warranty deed for the Janette property to himself by signing the name "Richard Cole". It was alleged that on March 6, 1985 the mortgage on the property was purchased by Gibraltar from Strongsville Savings & Loan Co.

It was alleged that the property was then sold by Lucille and Margaret Cole to Gary Reese on May 28, 1985 for $40,000.00 and that the mortgage payoff figure on July 24, 1985, at the time of closing, had increased to $27,707.00. The amended complaint alleged this increase represented loans to petitioner by Gibraltar. The amended complaint alleged that on July 23, 1985 a

lawsuit was filed by Margaret and Lucille Cole against Allen Gale, Gibraltar, petitioner and his wife, Judith Sagen and that the case was *dismissed at plaintiff's* costs on July 18, 1986. The amended complaint alleged that this conduct was in violation of DR1-102 (A)(4), (5) and (6).

Count Two (The Mortgage Claim)
Findings by Board

The findings by the Board are ambiguous. The Board, *while finding that Margaret Cole was not a credible witness* on behalf of the respondent then stated that the "trust agreement" was nothing but a three party agreement relating to certain real estate. The Board then stated that petitioner "blatantly lied" in this matter during the hearing itself, purportedly because they did not believe that petitioner had held himself out as "Richard Cole".

Count Five—Introduction

The issue is whether there was a fraudulent inducement by petitioner of a forty year friend and client in the transfer of two parcels of real estate and three automobiles on July 25, 1984. The relationship was substantiated by the fact that in 1977 the client, now deceased, had left one half of her estate to the petitioner in a Will prepared by a Florida attorney, and that in her last Will, prepared by a third party attorney, had left $25,000.00 to the petitioner. Notwithstanding this evidence, petitioner was prohibited from introducing live testimony as to the nature and extent of his relationship with the decedent over the years and at the time that the transfers occurred.

The Panel relied primarily upon the Journal Entries in a civil case for fraud, a case in which there was *no finding of fraud*, but was a finding of a breach of fiduciary duty by petitioner. However, the Journal Entry was not supported in evidence by transcripts of any of the proceedings, and it was accepted into evidence over objection. The civil case did not involve the same issue, the same burden of proof, nor the same parties, and a *civil* judgment has never been found as binding or preclusive regarding a disciplinary proceeding. The evidence at the disciplinary proceeding did show that the signature of the decedent on the transfers was genuine, and that the grantor had, on the same date and through the same attorney, transferred two other pieces of real estate to persons who had not been known nearly so long by the grantor.

The improper reliance upon a civil Journal Entry and the exclusion of relevant evidence offered by the petitioner should result in a dismissal of this charge in its entirety.

Count Five (The Szakacs Probate Matter)
The Allegations

Count Five alleged that Helen Szakacs had been a client of the petitioner for about 20 years prior to her death on November 11, 1984. In 1977 Helen Szakacs executed a will, *prepared by a Florida attorney*, naming petitioner as a beneficiary of one-half of her estate. In January, 1984 after having been hospitalized, Helen Szakacs prepared a one page holographic will. At the time of executing her holographic will her holdings were over $300,000.00 in an investment portfolio, plus cash and jewelry, four automobiles and four parcels of real estate.

The complaint alleged that on October 24, 1984, eighteen days before her death, she executed a new will, prepared by Brad Zalasko (Exhibit 38), which was ultimately admitted to probate. Paulette Bobko was appointed executrix and petitioner was bequeathed $25,000.00, and the remainder was left to Paulette and Judith Bobko.

The amended complaint alleged that Judith Bobko had been the fiancee of Carl Szakacs, the son of Helen Szakacs, who had predeceased her. That after his death, Helen Szakacs established a close relationship with Judith and Paulette Bobko.

The amended complaint alleged that Paulette Bobko filed a declaratory judgment action to set aside the transfer by Helen Szakacs of two parcels of real estate and three automobiles which had been transferred to petitioner and Bernice Pyle, based upon a theory of fraudulent inducement. The amended complaint alleged that the deeds were prepared by petitioner, at his office, on July 25, 1984, and that one deed conveyed property to the petitioner and another deed conveyed property to Bernice Pyle.

The amended complaint further alleged that Pyle operated an automobile title transfer business from space in petitioner's office and that the title was transferred pursuant to a power of attorney given by Helen Szakacs to Lynda Pyle on July 24, 1984.

The amended complaint alleged that a trial was held in the Probate Court before Referee John Polito where evidence was received from an expert documents examiner that there were many discrepancies in the deeds and auto titles.

The amended complaint alleged that the trial court found that the petitioner violated his fiduciary relationship by transferring property to himself and Bernice Pyle, which judgment was affirmed by the Court of Appeals for Cuyahoga County and that the Ohio Supreme Court declined to review the case.

Count five alleged that this conduct violated DR1-102(A)(4), DR1-102(A)(5) and DR1-102(A)(6).

Count Five (The Szakacs Probate Matter)
Findings of Board

The findings of the Board in this matter *tracked the journal entries of the Probate Court* and Court of Appeals for Cuyahoga County. The Board apparently adopted factual matters contained in those entries *without allowing petitioner the opportunity to offer evidence concerning those matters.*

The Board chided the petitioner for wishing to contest the facts that had been previously litigated at several levels (Tr. 526). The Board stated that the property transferred to the petitioner was worth $250,000.00 when *respondent's own evidence* showed that it was worth only $75,000.00 (Exhibit 40).

At the conclusion of respondent's presentation of evidence, various exhibits were offered. Petitioner strongly *objected to the receipt of the court decisions without the benefit of the transcripts* (Tr. 329-30). Petitioner, having been denied the opportunity to present all of his evidence and witnesses on the 16 issues, asked that the entire transcripts of the civil proceedings, which were available at the hearing, be accepted into evidence and considered along with the journal entries. This was denied by the Board (Tr. 330-33).

ARGUMENT

I. Due Process Of Law As Pronounced In *In Re Ruffalo,* 390 U.S. 544 (1968), Precludes A Finding Of A Violation Of The Code Of Professional Responsibility Upon A Matter Not Charged In A Disciplinary Complaint But Offered For The First Time During The Course Of A Disciplinary Hearing.

In Count One of the amended complaint (the Bohaty Matter), the allegations essentially tracked the events occurring in a civil lawsuit filed by the Bohatys against Burt H. Sagen for monies that had been deposited in a third-party escrow concerning satisfaction of monetary obligations under a land contract and which monies were returned to Burt H. Sagen by the escrow agent who had been appointed by the court. Mr. Sagen was charged in the disciplinary case with *conversion* of funds. He was *not* found in the civil case to have engaged in fraud.

However, the panel, while tracking the civil litigation, considered a new allegation (Tr. 328-29), with respect to the signature of Carol Humphrey [Poeppleman] on the original deed dated July 22, 1974 to R & B Restoration, Inc. (Exhibit 4). It was now, *for the first time,* claimed that the signature was forged. This was never alleged in the complaint or amended complaint and when this testimony developed at the hearing, a motion was made to strike the testimony of Carol Humphrey and that of Phillip Bouffard because that was not part of the allegations in the matter (Tr. 238). The Chairperson, Judge Lanzinger, stated that the testimony was *relevant* to Count One because it is "talking about a pattern of behavior as stated in Count I, I think the testimony is relevant for that purpose." (Tr. 329).

In the case of *In re Ruffalo*, 390 U.S. 544 (1968), the United States Supreme Court considered a similar claim. In that case, petitioner, John Ruffalo, Jr., had been indefinitely suspended from the practice of law by the Ohio Supreme Court on two findings of alleged misconduct. Thereafter reciprocal proceedings were brought in the United States Court of Appeals for the Sixth Circuit which relied upon the state court proceedings for its discipline. One of the charges against Ruffalo was that he had solicited F.E.L.A. plaintiffs as clients through an agent, Michael Orlando. At the hearings both Orlando and Ruffalo testified that Orlando did not solicit clients for the petitioner, but had merely investigated the cases for him. *The Disciplinary Panel*, after hearing this evidence *entered a charge* against Ruffalo based on the hiring of Orlando to investigate Orlando's own employer, the Baltimore & Ohio Railroad. This was objected to by Ruffalo and was denied by the Board. The United States Supreme Court, in concluding that there was a denial of due process, stated the following:

> Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. *Ex parte Garland*, 4 Wall. 333, 380, 18 L. Ed. 366; *Spevack v. Klein*, 385 U.S. 511, 515, 87 S. Ct. 625, 628, 17 L. Ed. 2d 574. *He is accordingly entitled to procedural due process, which includes fair notice of the charge . . . . See In re Oliver*, 333 U.S. 257, 273, 68 S. Ct. 499, 4507, 92 L. Ed. 682.
>
> In the present case petitioner had no notice that his employment of Orlando would be considered a disbarment offense until *after* both he and Orlando had testified at length on all the material facts pertaining to this phase of the case. As Judge Edwards, dissenting below said, "Such procedural

violation of due process would never pass muster in any normal *civil or criminal* litigation." 370 F.2d at 462.

These are adversary proceedings of a quasi-criminal nature. Cf. *In re Gault*, 387 U.S. 2, 33, 87 S. Ct. 1428, 1446, 18 L. Ed. 2d 527. The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh. (Emphasis added.) 390 U.S. at 550-51.

II. The Failure Of The Ohio Supreme Court To Define And Delineate Causes For Disciplinary Action Against An Attorney, Failure To Follow Its Own Decisions In Deciding These Cases And Failure To Address Constitutional Objections And Imposing Inconsistent Sanctions In Different Cases Results In A Denial Of Due Process Of Law.

In this case petitioner was disbarred permanently. However, from a reading of the opinion of the Ohio Supreme Court one would not even know that objections to the findings of the Board of Commissioners was even filed. Petitioner, in his objections, raised constitutional objections and also brought to the attention of the court other similar cases decided by the Ohio Supreme Court.

A fundamental precept of due process of law is that "... justice must satisfy the appearance of justice." *Offutt v. United States,* 348 U.S. 11, 14 (1954).

Since the court made absolutely no reference nor did it even mention that there were constitutional issues presented in this matter it cannot be said with any assurance that this satisfies the appearance of justice. It must be remembered that this is the only appeal or review by any court that the petitioner has. Consequently, it would seem that, at a minimum, there should be some reference to those objections that he did raise. A fair reading of the opinion does not even show what the claimed violations were other than the conclusion that these violated vague and illusory standards of illegal conduct involving moral turpitude, conduct involving dishonesty, fraud, deceit or misrepresentation, conduct prejudicial to the administration of justice, conduct adversely reflecting on fitness to practice law and appearance of impropriety. It is not stated within the opinion as to what the court found in these regards.

The assessment of a penalty of disbarment, being the most severe penalty that can be imposed, should warrant more than a fleeting reference to the report and findings of fact and conclusions of law. It was pointed out in the objections filed by the petitioner that these findings are seriously flawed, both factually and legally.

In this case the petitioner would have been in a better position to receive an indefinite suspension had he been convicted of a criminal offense. Prior cases from the court show that where there is a conviction of a criminal act involving fraud and dishonesty the most severe penalty is that of an indefinite suspension. *See Cincinnati Bar Ass'n v. Joseph*, 60 Ohio St. 3d 57, 572 N.E.2d 681 (1991); 6 Ohio Jur. 3d, *Attorneys at Law*, Section 79 (1978).

These regulations become meaningless when they are not exercised and used in a uniform manner. Thus, in these circumstances this certainly violates due process of law. As the United States Supreme Court has recently noted, "as long as discretion is exercised within reasonable constraints, due process is satisfied ..." *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1044 (1991).

Similarly, there was absolutely no mention of a controlling Supreme Court decision on issues raised on this case. One of the issues was whether proceedings in one forum may be used as conclusive findings in proceedings in another forum.

In this case, it was determined by the Board the court proceedings are conclusive determinations in these disciplinary proceedings. It was also determined that even though the one judicial proceeding had improperly allocated the burden of proof that this likewise was conclusive.

On March 13, 1991, the Ohio Supreme Court decided the case of *Kirschbaum v. Dillon*, 58 Ohio St. 3d 58, 567 N.E.2d 1291 (1990). In paragraphs 1 and 3 of the syllabus, the following was stated:

> A presumption of undue influence, rebuttable by a preponderance of the evidence, arises when (i) the relationship of attorney and client exists between a testator and an attorney, (ii) the attorney is named as a beneficiary in the will, (iii) the attorney/beneficiary is not related by blood or marriage to the testator, and (iv) the attorney/beneficiary actively participates in the preparation of the will.
>
> * * *
>
> Findings of fact made in one judicial or quasi-judicial proceeding are not admissible evidence in a second proceeding that does not involve the same parties, because to admit the findings of fact in evidence would be to invade the province of the finder of fact in the second proceeding.

What is more disturbing from these findings was that the objections pointed out serious flaws in these findings by the other court and even a misapprehension of the facts by the Board in considering these claims. Petitioner was clearly denied his right of due process of law and his ability to defend against these matters, when the other judicial proceedings which were determined to be conclusive, had serious flaws and even the exhibits which were offered as documentary evidence in support of these claims was misstated and misapprehended by the Board. Certainly this does not satisfy the appearance of fairness.

A review of the findings of the Board in this case show that the findings contain numerous factual errors that are inconsistent with undisputed evidence or even

evidence presented by the respondent. These errors are compounded by conflicting conclusions that were offered by the Board and the failure to assess evidence before it. It has reached improper conclusions based upon certain uncontradicted matters in the record along with the failure to allow cross-examination of witnesses in an attempt to present a defense on behalf of the petitioner. In these circumstances certainly this cannot be said to constitute clear and convincing evidence.

The Ohio Supreme Court has ruled that the right to contest allegations is a fundamental aspect of due process of law:

> Due process of law implies, in the most comprehensive sense, the right of the person affected thereby to be *present before the tribunal which pronounces judgment* upon a question of life, liberty or property, to be heard, by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him, such is not due process of law. *Williams v. Dollison*, 62 Ohio St. 2d 297, 299, 405 N.E.2d 714, 716 (1980) (Emphasis added).

Many findings by the panel, which in turn relied upon findings by the appellate courts in this case, are clearly erroneous and *even contrary to documents and evidence offered by the respondent.* The attempt by the panel to give preclusive effect to these prior judgments is a gross error. In these type of proceedings, prior judgments in civil cases have no preclusive effect or *res judicata* application. This argument was raised and considered in *Ohio State Bar Ass'n v. Weaver,* 41 Ohio St. 2d 97, 322 N.E.2d 665 (1977). In that case disciplinary proceedings were brought against Robert Weaver. Some of the counts in the complaint arose out of

the same conduct for which the respondent had been indicted and subsequently *acquitted.* He argued that his *acquittal* precluded a relitigation of these matters. In rejecting this claim the Supreme Court stated as follows:

> Although respondent has stipulated that he converted funds coming into his posseession in his capacity as a fiduciary, he nevertheless asserts that, because he was acquitted following trial on a criminal indictment, he cannot be subject to a subsequent disciplinary proceeding arising out of the same conduct.
>
> Such a contention is without merit. The doctrine of *res judicata* renders final judgments conclusive only when subsequent actions involve the *same parties,* or those in privity with them, as in the first action; *when the issues* to which the evidence is directed are identical in both actions; and when the *quantum of proof necessary* to render both the original and subsequent judgments is identical.
>
> Clearly, the doctrine does not apply with respect to the present proceeding. The Supreme Court of New Jersey, in *In re Pennica* (1962), 36 N.J. 401, 177 A. 2d 721, states, at page 418, 177 A. 2d at page 730, that:
>
> "*** Not only are the *parties* different but the *purposes* of the two proceedings are different. In the disciplinary matter, the primary purpose is not to punish an offender; it is to protect the public against members of the bar who are unworthy of the trust and confidence essential to the relationship of attorney and client; it is to ascertain whether the conduct of the attorney involved has demonstrated his unfitness to practice law, and if so to deprive him of the previously acquired privilege to serve as an officer of the court. *** Moreover, the *quantum* of proof required to warrant discipline or disbarment is different from that demanded for conviction of a criminal charge. The proceeding is not criminal in

> character; it is *sui generis,* stemming from the inherent power of the court to regulate the practice of law and admission of persons to engage in that practice. *** " See, also, annotation, 123 A.L.R. 779, 780 *et seq.*, and Supplemental Decisions. 41 Ohio St. 2d at 99-100, 322 N.E.2d at 667 (Emphasis added).

Lastly, sanctions in a disciplinary proceeding should be based upon the evidence and not upon irrelevant matters and they should be based upon a consistent policy through the State.

This disciplinary case and all the civil matters involved therein had been matters of substantial emotional involvement through recent years. Petitioner was entitled to, and did defend in those civil actions and was successful against the charge of fraud and his former secretary's action. Respondent was entitled to defend his actions, he was entitled to notice of the charges, and he was entitled to present his evidence in this case, and his entitlement was denied him in many regards. This most likely resulted in what was perceived as an "attitude problem". Respondent recommended permanent disbarment and the Board recommended same, and the Board's attitude is reflected in its final paragraph on page 10 of its findings which reads as follows:

> "The Panel considered: all of the court documents in the underlying cases; the demeanor of the witnesses at hearing as well as their testimony; the evasive nature of Respondent's testimony and especially his outright lie to the Panel; Respondent's lack of concern or remorse over his behavior; and finally, the serious consequences his actions caused others.***"

This appears to be another of the line of cases in which petitioner's efforts to defend himself, plus his frustration as to civil matters as evidenced at the hearing, have caused a Board to recommend a sanction far in excess of that which would be warranted. It is for this reason that the ABA Standards for Imposing Lawyer's Sanctions were adopted by the ABA and recommended for consideration by the states.

As to Count One, even if "conversion" were found, the meager proof would at best establish that petitioner should have followed another course of conduct after the money was returned to him by the escrow agent, and should not have returned the money to R & B to be held until such time as title could be conveyed. The ABA standards, in regard to misuse of client's funds, provide as follows:

> 1. 4.13—Reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.
>
> 2. 4.14—Admonition is generally appropriate when a lawyer is negligent in dealing with client property and causes little, or no actual, or potential injury to a client.

A primary issue, according to the standards, is the intent of the lawyer. In this instance, petitioner did not believe or "know" that he was dealing improperly with any client's property. In fact, he was not improperly handling the client's property for it was being returned to the party who had provided same. At most then, he was "negligent" in dealing with the third party property, and that places him into the reprimand or admonition category. The determinative factor as to whether it should be a reprimand or admonition, is whether it

caused "injury or potential injury" to a client, or whether it caused "little or no actual or potential injury to a client." In this case, there was no injury to his client who had been held harmless, but the civil litigation has resulted in a finding that petitioner owes the non-client the amount in question. Since the harm to the non-party is relevant, these standards would recommend a *public reprimand* for this conduct *if* this court concludes there was any improper conduct.

As to *Count Two,* there is no evidence that petitioner lied to the hearing committee. His testimony, which they view as a lie, is directly supported by all other evidence in the case. This reflects the Panel's frustration rather than the evidence before them. No fraud has been established in regard to Count Two, but even if fraud existed, an analysis of Standard 4.6 pertaining to "lack of candor" would be necessary. Since this section is dealt with in regard to Count Five, the analysis regarding the appropriate sanction is set forth in that count.

As to *Count Five,* the allegation here is that petitioner entered into a fraudulent transaction with his client through which he personally benefited. The evidence was substantially restricted in regard to this count, but *even the civil judgment found there was no fraud in his action.* Petitioner was in a fiduciary relationship with his client, and even if the evidence did clearly and convincingly support a finding of a violation of DR 1-102(A)(4), it would not, in these circumstances, support a permanent disbarment from the practice of law. At most, we have a situation where petitioner, in the civil cases, was unable to establish his relationship to support that there was a breach of a fiduciary duty in either the transfer to him or to the other parties involved.

The analysis for an appropriate sanction when there has been a "lack of candor" to a client are set forth as follows:

> 1. 4.62—Suspension is generally appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client.
>
> 2. 4.63—Reprimand is generally appropriate when a lawyer negligently fails to provide a client with accurate or complete information, and causes injury or potential injury to the client.

It is respectfully submitted that there was no deceit of Ms. Szakacs, a lifelong friend of petitioner, and a person who had previously left substantial sums to petitioner. The burden remains upon respondent, and respondent has failed to meet that burden because the real evidence would not support that burden.

CONCLUSION

The decision by the Ohio Supreme Court runs contrary to established precedent of the United States Supreme Court. Clearly the constitutional rights of the petitioner were ignored during the proceedings before the Ohio Supreme Court. In these circumstances a petition for writ of certiorari should be allowed.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX

OPINION OF THE SUPREME COURT OF OHIO

(Decided July 3, 1991)

No. 90-2088

THE SUPREME COURT OF OHIO

DISCIPLINARY COUNSEL,
Relator,

vs.

BURT H. SAGEN,
Respondent.

[99 Ohio St. 3d 62]

Attorneys at law—Misconduct—Disbarment—Illegal conduct involving moral turpitude—Conduct involving dishonesty, fraud, deceit or misrepresentation—Conduct prejudicial to administration of justice—Conduct adversely reflecting on fitness to practice law—Appearance of impropriety.

(No. 90-2088—Submitted April 9, 1991—
Decided July 3, 1991.)

ON CERTIFIED REPORT by the Board of Commissioners on Grievances and Discipline of the Supreme Court, No. 89-44.

On August 25, 1989, relator, Disciplinary Counsel, filed a multi-count complaint against respondent, Burt H. Sagen. An amended complaint followed on November 2, 1989. After obtaining a time extension, respondent filed a timely answer.

Three of the incidents alleged in the complaint are particularly relevant. The first ("Count One") arose from protracted litigation between Mr. and Mrs. Robert E. Humphrey and Mr. and Mrs. Vencel Bohaty. In 1969, the Humphreys purchased real estate from the Bohatys on a land contract. The Humphreys later defaulted on payments and the Bohatys sued in the Medina County Common Pleas Court to rescind the contract. The Humphreys retained respondent as counsel and counterclaimed for specific performance.

The Humphreys prevailed. A June 21, 1976 judgment entry conveyed the property to the Humphreys and ordered that monies previously deposited in escrow on behalf of the Humphreys, plus interest and back taxes, be tendered to the Bohatys. Respondent approved this entry.

The Court of Appeals for Medina County affirmed the judgment of the trial court. However, the escrow agent returned the deposited funds in the amount of $13,361.29 to respondent, who retained the money. Being unable to obtain this money from respondent, the Bohatys successfully sued respondent in the Court of Common Pleas of Cuyahoga County. In October, 1985, a jury awarded the Bohatys $13,361.29 plus specified pre- and post-judgment interest. The Court of Appeals for Cuyahoga County affirmed. To date, however, respondent has paid nothing to the Bohatys.

The second incident ("Count Two") also stemmed from a real estate transaction. In early 1985, respondent, by his own admission, signed the name of Richard Cole on a warranty deed transferring property from Cole to respondent. In defense, respondent falsely claimed that he had been "designated" as "Richard Cole" in a "trust

agreement" between respondent and Margaret Cole, Richard Cole's sister. The alleged "trust agreement," however, was no more than a property agreement that said nothing about respondent's so-called "desigination" as Richard Cole.

The third incident ("Count Five") involved respondent's representation of Helen Szakacs, a longtime client. According to a judgment entry from a resulting lawsuit, Szakacs, in her later years, was befriended by Paulette and Judith Bobko. In January 1984, Szakacs prepared a holographic will devising her Kuenzer Drive home in Seven Hills, Ohio, and a commercial property on Pearl Road in Parma to Judith Bobko. It also devised a Florida property to Paulette Bobko and also indicated that Szakacs's Virginia Road property in Parma could not be sold without first giving the tenant, Bernice Pyle, an opportunity to buy it.

On July 25, 1984, two quitclaim deeds were executed that became the source of later controversy. The first deeded a remainder interest in the Pearl Road property to respondent. The second deeded a remainder interest in the Virginia Road property to Bernice Kmitt, a.k.a. Bernice Pyle, respondent's longtime associate.

In October, 1984, Szakacs retained a new attorney, Bradford Zelasko, and asked him to prepare a new will. Apparently, she reiterated to him her desire to have the Bobkos receive the Pearl and Virginia Road properties on her death. The will prepared by Zelasko bequeathed $25,000 to respondent with the residue of the estate going to the Bobkos.

Szakacs died on November 11, 1984. On November 16 respondent recorded the Pearl and Virginia Road deeds. Szakacs's will was admitted to probate the

following March. In August 1985, Paulette Bobko, Szakacs's executrix, and Judith Bobko commenced a declaratory judgment action seeking, among other things, to have the Pearl and Virginia Road properties returned to the estate.

The Cuyahoga County Court of Common Pleas, Probate Division, by judgment entry of January 6, 1988, ordered the property returned to the estate. The court of appeals affirmed that judgment. See *Bobko v. Sagen* (1989), _____ Ohio App. 3d _____, _____ N.E.2d _____.

A panel of the Board of Commissioners on Grievances and Discipline of the Supreme Court ("panel") heard these and other allegations during the course of a two-day hearing on June 21 and 22, 1990. After considering numerous witnesses and exhibits, the panel concluded that the allegations contained in Counts One, Two and Five were true and dismissed two remaining counts. The panel emphasized respondent's propensity for placing the blame for his actions on others and his "remarkable lack of insight into his situation."

As to Count One, the panel found that respondent had violated DR 1-102(A)(3) (illegal conduct involving moral turpitude), 1-102(A)(4) (conduct involving dishonesty, fraud, deceit or misrepresentation), 1-102(A)(5) (conduct prejudicial to administration of justice), 1-102(A)(6) (conduct adversely reflecting on fitness to practice law) and 9-101 (appearance of impropriety). As to Counts Two and Five, the panel found that respondent had violated DR 1-102(A)(4), (5) and (6) in each count. The panel recommended that respondent be disbarred from the practice of law in Ohio.

The board adopted the recommendations of the panel, and also recommended that costs of the proceeding be charged to the respondent.

J. Warren Bettis, Disciplinary Counsel, and *Charles T. Brown,* for relator.

Paul Mancino, Jr. and *Charles W. Kettlewell,* for respondent.

Per Curiam. We adopt the findings of fact, conclusions of law, and recommendation of the board. Respondent is hereby permanently disbarred from the practice of law in Ohio. Costs taxed to the respondent.

Judgment accordingly.

MOYER, *C.J.*, SWEENEY, HOLMES, DOUGLAS, WRIGHT, H. BROWN, and RESNICK, *JJ.*, concur.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION OF THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE OF THE SUPREME COURT OF OHIO

Case No. 89-44

THE BOARD OF COMMISSIONERS
On
GRIEVANCES AND DISCIPLINE
OF
THE SUPREME COURT OF OHIO

In re:

Complaint against:

BURT H. SAGEN, Atty. Reg. #0007980,
Respondent,

DISCIPLINARY COUNSEL,
Relator.

A formal hearing was held in this case on June 21 and June 22, 1990 in Cleveland, Ohio, by a panel consisting of Hon. Leo P. Morley, Steven Hollon, and Judge Judith Ann Lanzinger, Chairman. None of the panel members is a member of the district from which the complaint originated and none had served on the probable cause panel which reviewed the complaint. Relator was represented by J. Warren Bettis and Charles Brown as special counsel; Respondent was present and was represented by Paul Mancino, Jr. and Carol D. Rose Mancino.

The complaint against Respondent consisted of five separate counts:

Count I (The Bohaty Matter) charged that Respondent converted funds owed to the opposing party in a lawsuit, thereby violating DR 1-102(A)(3) illegal conduct involving moral turpitude; DR 1-102(A)(4) conduct involving dishonesty, fraud, deceit, or misrepresentation; DR 1-102(A)(5) conduct prejudicial to administration of justice; DR 1-102(A)(6) conduct adversely reflecting on fitness to practice law; DR 9-101 appearance of impropriety.

Count II (The Mortgage Forgery) charged that Respondent forged certain signatures on deeds and real estate records to the detriment of Margaret Cole Hughes, thereby violating Dr 1-102(A)(4), (5) and (6).

Count III (The Police Report Claim) charged that Respondent filed false police reports on November 2, 1985 with the Ashtabula Police Department and November 3, 1985 with the North Royalton Police Department, thereby violating DR 1-102(A)(4), (5) and (6).

Count IV (Unauthorized Practice of Law) charged that Respondent assisted Margaret Cole, a non-attorney, to practice law through a "power of attorney" on March 2, 1984, thereby violating Dr 3-101 (aiding unauthorized practice of law).

Count V (The Szakacs Probate Matter) charged that Respondent misused his fiduciary relationship with an elderly woman by transferring property to himself in violation of her wishes, thereby violating Dr 1-102(A)(4), (5) and (6).

FINDINGS OF FACT

Over fifty exhibits were entered into evidence by Relator and ten were entered by Respondent. No stipulations were entered into for the record. Relator called eleven witnesses and Respondent called nine of his own during the two days of testimony. The factual matters on each count were hotly contested by the parties, even matters which had already been determined many times over in other courts. The following will summarize the facts relevant to each count as determined by the Board.

Count I (The Bohaty Matter)

The Bohaty matter involves lengthy real estate litigation between two couples, Mr. and Mrs. Robert Humphrey, who were clients of Respondent, and Mr. and Mrs. Vencel Bohaty. The Humphreys bought 20 acres in Medina County from the Bohatys in 1969 on land contract for $9,500. Three years later when the Bohatys sued to cancel the contract for tardy payments, the Humphreys counterclaimed for specific performance. Early during the course of litigation, without advising the court, Robert and Carol Humphrey assigned their interest in the land contract to a corporation which they formed with Respondent. After the corporation deposited in court the balance due on the land contract, the Humphreys prevailed in 1973.

The Medina Court ordered the Bohatys to deliver into escrow for the Humphreys a warranty deed and title guarantee and ordered the Clerk to then pay the Bohatys the money which the Humphreys had deposited. The Court decreed its judgment would convey the property to the Humphreys if the Bohatys refused to comply within ten days.

Because they intended to appeal, Bohatys did not comply with the order. Meanwhile, Robert Humphrey died and his wife Carol, as executrix of the estate replaced him for purposes of this litigation. In 1975, the Medina Court again held hearings in this case and finally issued an entry in 1976 approved by counsel for all parties which determined the amount the Humphreys then owed Bohatys for the land, interest, taxes and a tractor sold to them. The entry stated all funds had been deposited with an escrow agent who was then ordered to pay the funds over to the Bohatys. Without requiring a deed or title guarantee, the entry stated it constituted conveyance of property to the Humphreys.

In fact, on November 4, 1975 Respondent had already delivered $13,361.29 on behalf of his clients, the Humphreys, to Lorin J. Nepert as escrow agent by obtaining the funds from the corporation in which he and the Humphreys were principals. The Bohatys still were dissatisfied, and continued to appeal. On July 20, 1977, after the last appeal failed, their attorney wrote Mr. Nepert to request the funds. Due to miscommunication, Mr. Nepert did not return the funds to the Bohatys but instead sent them to the Respondent.

Respondent wrote one letter to the Bohatys' attorney on December 2, 1977. Afterward, when according to Respondent the attorney did not reply, he returned the funds to his own corporation. In July, 1980 when communication was finally acknowledged, Respondent maintained he could not deliver funds to the Bohatys without receiving a title guarantee for the property. As a result, Bohatys filed suit and obtained a jury verdict on October 17, 1985 in their favor for judgment on the entire judgment of $13,361.29 plus prejudgment interest from May 1, 1979 as well as

postjudgment interest. The 8th District Court of Appeals affirmed the entry on March 19, 1987. *As of the date of the hearing no money was ever paid to the Bohatys.*

All the major players testified at the hearing. In addition, Philip Bouffard, a forensic document examiner decisively stated that the signature on the original deed assigning the land contract from the Humphreys to R & B Restoration, Respondent's corporation, was forged. This corroborated Carol Humphrey Poeppleman's testimony that she did not sign the deed on July 22, 1974 in front of Burt Segan as the document showed.

Count II (The Mortgage Property)

By his own admission, Respondent signed the name "Richard Cole" to at least one deed of several involving residential real estate. He explained this by stating "I am Richard Cole" and that he entered into a trust agreement with Margaret Cole, his former secretary, where he was "designated" as Richard Cole. This "trust agreement" referred to, however, is nothing but a three party agreement relating to certain real estate. The Board therefore found Respondent blatantly lied in this matter during the hearing itself.

Count III (The Police Report Claim) and Count IV (Unauthorized Practice of Law)

Count 3, the false police report claim and Count 4, the unauthorized practice of law claim both related to Margaret Cole, Respondent's former secretary. Respondent was charged with signing a power of attorney March 2, 1984 enabling Margaret Cole to practice law. He was also charged in a separate count with filing two false police reports over a "stolen" Ute-

Liner, a mobile home, when he knew he had authorized Margaret Cole to use it. Witnesses testifying on these two claims conflicted with one another. It was established, however, that Respondent and Ms. Cole had a volatile and now acrimonious, relationship. Indeed, when Respondent was asked to justify his behavior on all counts, he responded to the Board that *everything* was the fault of Margaret Cole.

Ms. Cole herself was not a credible witness on behalf of the Relator and her testimony along with Relator's other witnesses did not meet the standard of clear and convincing proof required. Since the Board did not find that either of these counts was proved by clear and convincing evidence, it dismisses them.

Count V (The Sxakacs Probate Matter)

The Szakacs probate matter also involves lengthy litigation. The Court of Appeals decision dated May 18, 1989 affirmed the judgment entry of the probate court which set aside certain transfers of property from the Estate of Helen Szakacs to Respondent and his friend Bernice Pyle. Respondent was a friend of Ms. Szakacs for over twenty years. She treated him like a son. In 1977 she executed a will whereby Respondent would receive one-half of her estate after death of other family members. Mrs. Szakacs own son had died of cancer, cared for in his last days by Judith Bobko, his fiancee. As a result of Mrs. Szakacs being left without immediate family, she became dependent on Judith and her sister Paulette Bobko. The Bobko sisters visited Mrs. Szakacs on a daily basis and in return, Mrs. Szakacs referred to them as her adopted family. The women cared for her gratuitously when she became ill. In January 1984 Mrs. Szakacs prepared a holographic will, leaving the majority of her property including two residences and a commercial piece of real estate to the Bobkos.

On July 24, 1984 Mrs. Szakacs met with Bernice Pyle, who had a car title transfer agency, to have Ms. Pyle transfer four vehicles which Mrs. Szakacs owned, including a 1955 Cadillac, 1958 Cadillac, 1963 Studebaker Avanti, a 1980 Chevrolet Station Wagon and a 1976 Chevrolet Sedan. The next day, Mrs. Szakacs met with Respondent to have him transfer real property out of her estate. These meetings led to the heart of the dispute with Respondent.

On July 25, 1984, two deeds were prepared giving property to Judith Bobko and Paulette Bobko along with a power of attorney given to Paulette. Mrs. Szakacs signed the two deeds and asked to have them recorded. The deeds were not recorded in the usual fashion since Respondent said he would do it himself. According to Respondent, two *other* deeds for additional property were instructed to be prepared, one for himself and one for Bernice Pyle. Helen Szakacs retained a life estate on all of the parcels transferred.

On August 15, 1984 Mrs. Szakacs made another trip to Respondent's office to sign many documents for a business transfer. She did not read some of the documents before signing.

Evidence also showed that in early October 1984 Helen Szakacs obtained a new attorney, Brad Zelasko to draft her final will. She told him she did not trust her present attorney (Respondent) to draft it for her. Mrs. Szakacs also explained she wanted to repay Respondent by including a specific bequest of $25,000 to him in her will and paying him $10,000 before her death. She feared Respondent would come after her estate after her death and requested Mr. Zelasko to put in a clause within her will to prevent this. Mrs. Szakacs explained that she already had signed two real estate deeds over to the

Bobkos and that she had two other properties which she wished deeded over to the Bobkos as well. Her attorney followed her instructions and Mrs. Szakacs died on November 11, 1984. Respondent recorded the deeds to the parcels on November 16, 1984.

The Court of Appeals found that Respondent breached his fiduciary duty. It also appeared through testimony from defense witnesses that Respondent's own version of the facts was implausible. For example, it did not make sense for Mrs. Szakacs to demand that the deeds be completed on July 25th, and then to wait three and one-half hours for them only to instruct Respondent to record them at an indefinite future time. The alleged instruction to delay filing was not consistent with Mrs. Szakacs' reservation of life estates in the parcels nor with her unrefuted intent to dissipate her estate. Respondent's bill for the deeds undermined his claim that Mrs. Szakacs had given him a commercial parcel worth $250,000 on the same day.

Just as in the Bohaty matter, Respondent wished to contest the facts that had been previously litigated at several levels or wished to argue over irrelevant matters in the Szakacs case. For example, he made much of the original complaint asserting that probate documents were forged, totally ignoring the real question of the breach of fiduciary duty and the allegations of fraud.

His testimony on his own behalf before the Board was that he is 57 years old and has been practicing law since 1964, mostly as a sole practitioner. He has also been involved in a number of businesses most notably R & B Restoration, a corporation he set up for restoring antique cars. When he was asked to explain why he believed he was brought before the disciplinary panel, he responded that everything was the fault of Margaret Cole. Respondent displayed a remarkable lack of insight into his situation.

CONCLUSIONS OF LAW

The Board finds by clear and convincing evidence that in regard to *Count I (The Bohaty Matter)* Respondent violated DR 1-102(A)(3), illegal conduct involving moral turpitude; DR 1-102(A)(4) conduct involving dishonesty, fraud, deceit, or misrepresentation; DR 1-102(A)(5) conduct prejudicial to administration of justice; DR 1-102(A)(6) conduct adversely reflecting on fitness to practice law; DR 9-101 appearance of impropriety. It finds in regard to *Count II (The Mortgage Forgery)* Respondent violated DR 1-102(A)(4), (5) and (6). It dismisses *Counts III (The Police Report Claim) and Count IV (Unauthorized Practice of Law).* It finds Respondent violated DR 1-102(A)(4), (5) and (6) with respect to *Count V (The Szakacs Probate Matter).*

Relator recommended permanent disbarment. Respondent initially asked for dismissal of all counts or, at most, a public reprimand.

The Panel considered: all of the Court documents in the underlying cases; the demeanor of the witnesses at hearing as well as their testimony; the evasive nature of Respondent's testimony and especially his outright lie to the Panel; Respondent's lack of concern or remorse over his behavior; and finally, the serious consequences his actions caused others. After full consideration the Panel agrees with the Relator in this cause and unanimously recommends permanent disbarment of Respondent Burt H. Sagen.

RECOMMENDATION

Pursuant to Gov. Bar R. V(18), the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considered this matter on October 12, 1990. The Board adopted the Findings of Fact, Conclusions of Law and Recommendation of the Panel and recommends that the Respondent, Burt H. Sagen, be permanently disbarred from the practice of law in the State of Ohio. The Board further recommends that the costs of these proceedings be taxed to the Respondent in any disciplinary order entered, so that execution may issue.

Pursuant to the order of the Board of Commissioners on Grievances and Discipline of The Supreme Court of Ohio, I hereby certify the foregoing Findings of Fact, Conclusions of Law, and Recommendations as those of the Board.

/s/ JONATHAN W. MARSHALL
JONATHAN W. MARSHALL, Secretary
Board of Commissioners on
Grievances and Discipline of
The Supreme Court of Ohio

ENTRY OF THE SUPREME COURT OF OHIO DENYING REHEARING

(Dated August 7, 1991)

Case No. 90-2088

THE SUPREME COURT OF OHIO

1991 TERM

To wit: August 7, 1991

DISCIPLINARY COUNSEL,
Relator,

v.

BURT H. SAGEN,
Respondent.

REHEARING ENTRY

IT IS ORDERED by the Court that rehearing in this case be, and the same is herby, denied.

(Court of Appeals No. 8944)

/s/ THOMAS J. MOYER
Chief Justice

(2)

Supreme Court, U.S.
FILED
NOV 22 1991
OFFICE OF THE CLERK

No. 91-675

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

BURT H. SAGEN,

Petitioner,

vs.

DISCIPLINARY COUNSEL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Was petitioner afforded due process of law during disciplinary proceedings where

   a) he was given a full and fair opportunity before the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court to defend himself against charges made in a complaint issued by Respondent,

   b) the penalty imposed upon petitioner was based upon a finding by the Board that petitioner had violated the Disciplinary Rules as was charged in the complaint, and

   c) the proceedings before the Board of Commissioners were reviewed by the Supreme Court of Ohio?

PARTIES TO THE PROCEEDING

Petitioner

1. Burt H. Sagen

Respondent

2. Disciplinary Counsel of the Ohio Supreme Court.

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STATEMENT OF THE CASE

On August 25, 1989, Respondent ("Disciplinary Counsel") filed a complaint against Petitioner ("Petitioner or Sagen"), alleging numerous violations of the Code of Professional Responsibility. An amended complaint followed on November 2, 1989. After obtaining a time extension, Sagen filed a timely answer.

Three of the incidents alleged in the complaint are particularly relevant. The first ("Count One") arose from protracted litigation between Mr. and Mrs. Robert E. Humphrey and Mr. and Mrs. Vencel Bohaty. In 1969, the Humphreys purchased real estate from the Bohatys on a land contract. The Humphreys later defaulted on payments and the Bohatys sued in the Medina County Common Pleas Court to rescind the contract. The Humphreys retained Sagen as counsel and counterclaimed for specific performance.

The Humphreys prevailed. A June 21, 1976 judgment entry conveyed the property to the Humphreys and ordered that monies previously deposited in escrow on behalf of the Humphreys, plus interest and back taxes, be tendered to the Bohatys. Sagen approved this entry.

The Court of Appeals for Medina County affirmed the judgment of the trial court. However, the escrow agent returned the deposited funds in the amount of $13,361.29 to Sagen, who retained the money. Being unable to obtain this money from Sagen, the Bohatys successfully sued him in the Court of Common Pleas of Cuyahoga County. In October 1985, a jury awarded the Bohatys $13,361.29 plus interest. The Court of Appeals for Cuyahoga County affirmed. To date, however, Sagen has paid nothing to the Bohatys.

The second incident ("Count Two") also stemmed from a real estate transaction. In early 1985, Sagen, by his own admission, signed the name of Richard Cole on a warranty deed transferring property from Cole to Petitioner. Sagen falsely claimed that he had been "designated" as "Richard Cole" in a "trust agreement" between Petitioner and Margaret

Cole, Richard Cole's sister. The alleged "trust agreement," however, was no more than a property agreement that said nothing about Sagen's so-called "designation" as Richard Cole.

The third incident ("Count Five") involved Sagen's representation of Helen Szakacs, a long time client. According to a judgment entry from a resulting lawsuit, Szakacs, in her later years, was befriended by Paulette and Judith Bobko. In January 1984, Szakacs prepared a holographic will devising her Kuenzer Drive home in Seven Hills, Ohio, and a commercial property on Pearl Road in Parma to Judith Bobko. It also devised a Florida property to Paulette Bobko and also indicated that Szakacs's Virginia Road property in Parma could not be sold without first giving the tenant, Bernice Pyle, an opportunity to buy it.

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Szakacs died on November 11, 1984. On November 16, Sagen recorded the Pearl and Virginia Road deeds. Szakacs's will was admitted to probate the following March. In August 1985, Paulette Bobko, Szakacs's executrix, and Judith Bobko commenced a declaratory judgment action seeking, among other things, to have the Pearl and Virginia Road properties returned to the estate.

The Cuyahoga County Court of Common Pleas, Probate Division, by judgment entry of January 6, 1988, ordered the property returned to the estate. The court of appeals affirmed

that judgment. *See Bobko v. Sagen,* 61 Ohio App. 3d 397, 572 N.E.2d 823 (1989).

A panel of the Board of Commissioners on Grievances and Discipline of the Supreme Court ("panel") heard these and other allegations during the course of a two-day hearing on June 21 and 22, 1990. After considering the testimony of numerous witnesses and the exhibits, the panel concluded that the allegations contained in Counts One, Two and Five were true but dismissed two remaining counts. The panel emphasized Sagen's propensity for placing the blame for his actions on others and his "remarkable lack of insight into his situation."

As to Count One, the panel found that Sagen had violated DR 1-102(A)(3) (illegal conduct involving moral turpitude), 1-102(A)(4) (conduct involving dishonesty, fraud, deceit or misrepresentation), 1-102(A)(5) (conduct adversely reflecting on fitness to practice law) and 9-101 (appearance of impropriety). As to Counts Two and Five, the panel found that Sagen had violated DR 1-102(A)(4)-(6) in each count. The panel recommended that Sagen be disbarred from the practice of law in Ohio. The board adopted the recommendations of the panel. The Ohio Supreme Court adopted the findings of fact, conclusions of law and recommendation of the Board. *Disciplinary Counsel v. Sagen,* 61 Ohio St. 3d 62, 572 N.E.2d 658 (1991), *rehearing denied,* 61 Ohio St. 3d 1432, 575 N.E.2d 220 (1991). Sagen was permanently disbarred from the practice of law in Ohio.

ARGUMENT

I. THIS CASE DOES NOT WARRANT AN EXERCISE OF THIS COURT'S JURISDICTION.

Rule 10 of the Rules of the Supreme Court of the United States provides the basic criteria for determining whether a case warrants the issuance of a writ of certiorari.

* * *

> (a) When a United States court of appeals has rendered a decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United Stated court of appeals.
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

This case does not satisfy any of these criteria.

First, Petitioner has failed to identify a conflict between the decision in this case and any of the types of decisions discussed in Rule 10(a)-(c). Second, there is no suggestion that the court below "departed from the accepted and usual course of judicial proceedings." See Rule 10(a). Consequently, there is no need for "an exercise of this Court's

power of supervision." *See Id.* Third, this case does not involve "an important question of federal law" that needs to be "settled by this Court." *See* Rule 10(c). Although Sagen argues that the proceedings before the Board violated his right to due process of law, this Court will find, upon review, that none of his accusations constitute a cognizable Fourteenth Amendment claim.

II. PETITIONER WAS ACCORDED DUE PROCESS OF LAW IN THE PROCEEDINGS BEFORE THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE AND THE SUPREME COURT OF OHIO.

A. The Ohio Supreme Court's Judgment Disbarring Petitioner Was Based Upon Findings Made By the Board Of Commissioners On Grievances And Discipline That Petitioner Had Violated The Code Of Professional Responsibility As Was Charged In The Complaint Against Petitioner And Not Upon Matters Offered For The First Time During The Course Of His Disciplinary Hearing.

Sagen contends he was denied due process of law in the disciplinary proceedings against him. He relies on *In Re Ruffalo,* 390 U.S. 544 (1968), as authority.

In *In Re Ruffalo,* the Court held that an attorney subject to disciplinary proceedings was denied procedural due process when a disbarment offense was based upon charges that arose during the disciplinary proceedings. The Court determined the attorney was denied fair notice as to the subject matter of the grievance procedure and the precise nature of the charges against him, and as such, the attorney was denied due process in the disciplinary proceedings. 390 U.S. at 591

In contrast, Sagen's disbarment was based upon charges contained in the complaint filed by the Disciplinary Counsel.

Those charges were considered during an evidentiary hearing before the Board of Commissioners. After testimony was taken from "[a]ll the major players" and all documentary evidence was introduced, the Board determined that Sagen violated the Rules of Professional Responsibility and recommended to the Supreme Court of Ohio that he be disbarred. On review of the record, the court adopted the recommendation of the Board.

It is true that one witness testified concerning an incident that was not one of the specific instances of misconduct referred to in the complaint. But Sagen was *not* disciplined for his conduct in respect to this incident. Thus, the facts of *In Re Ruffalo* are inapposite to the facts of this case.

B. The Disciplinary Proceedings And Sanction Imposed Upon Petitioner Were Consistent With Due Process Of Law

Sagen recites a litany of faults with the disciplinary proceedings that he believes violated his right to due process of law. However, even a cursory examination of Petitioner's allegations shows that he was not deprived of due process of law.

1. Sagen claims that he was denied due process of law because the Ohio Supreme Court's opinion in this case did not mention that he filed constitutional objections to the Board's findings. *See* Petition for Cert. at P. 18. But nothing in the decisions of this or any other court holds, or even suggests, that a violation of due process occurs when an appellate court, in what amounts to a summary affirmance, chooses not to address and refute individually all defenses raised during the course of the proceedings below.

2. Sagen next claims that the Ohio Supreme Court's opinion does not show what the claimed violations were. This contention, however, ignores the fact that the Board offered a full explanation of the conduct for which he was disciplined and that the Supreme Court of Ohio adopted the findings of fact, conclusions of law and recommendation

of the Board. The Ohio Supreme Court was not obligated to restate the conduct at issue.

3. Sagen also argues that the penalty imposed upon him by the Board and adopted by the Ohio Supreme Court was too harsh and was based upon irrelevant matter, namely, the Board's perception that Petitioner had an "attitude problem". *See* Petition for Cert. at P. 23. Rule V, § 7 of the Supreme Court Rules for the Government of the Bar provides that "any Justice, judge, or attorney found guilty of misconduct shall be disciplined as follows:"

(a) a permanent disbarment from the practice of law, or,
(b) suspension for an indefinite period from the practice of law subject only to reinstatement as hereinafter provided, or,
(c) suspension for a period of six (6) months to two (2) years from the practice of law, which suspension may be stayed in whole or in part, or,
(d) probation for such period of time and upon such conditions as the Supreme Court determines, but only in conjunction with a suspension ordered pursuant to Section 7(c) of this Rule, or,
(e) a public reprimand.

Sagen's sanction was consistent with these rules. The sanction he received, therefore, did not violate his right to due process of law.

4. Finally, Sagen asserts that his right to due process was violated when the Ohio Supreme Court in effect permitted the doctrine of offensive collateral estoppel to be applied to his case. *In Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979), the Court recognized the use of offensive collateral estoppel in legal proceedings. Offensive collateral estoppel may be invoked by a plaintiff who seeks to estop a defendant from relitigating the issues which the defendant previously litigated and lost against another party in a

previous lawsuit. *Parklane Hosiery,* 439 U.S. at 331.

In this case, the Board adopted the findings made by an Ohio court of common pleas in a related civil suit involving *Sagen. See Bobko v. Sagen,* 61 Ohio App. 3d 397, 572 N.E. 2d 823 (1989). The Ohio Supreme Court, by adopting the recommendation of the Board, approved the Board's reliance on offensive collateral estoppel to prevent Sagen from relitigating issues that he previously litigated and lost in *Bobko.*

Sagen argues, however, that the Ohio Supreme Court, in *Kirschbaum v. Dillon,* 58 Ohio St. 3d 58, 567 N.E. 2d 1291 (1990), rejected the use of offensive collateral estoppel in attorney disciplinary proceedings. Sagen misreads *Kirschbaum.*

In *Kirschbaum,* the Ohio Supreme Court held that findings of fact arrived at by the Board of Commissioners could not be relied on in a court proceeding. In the case at bar, the Ohio Supreme Court implicitly concluded that *findings of fact made by a court* could be utilized in a disciplinary proceeding. Thus, there is no inconsistency between *Kirschbaum* and this case.

Even if there are inconsistencies between *Kirschbaum* and this case, the most that Sagen can establish is a violation of *Ohio* law. Consideration of state law questions, however, are beyond the jurisdiction of this Court. Consequently, whether the Ohio Supreme Court acted contrary to state law when it permitted offensive collateral estoppel to apply in this case is not an appropriate subject for review.

CONCLUSION

For the preceding reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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